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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROGER REEVES,

Petitioner,

vs.

DSI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER REEVES, *Pro Se*
B-12 Chatt. Court
Eufaula, AL 36027
(334) 687-7336

QUESTIONS PRESENTED

(1.) Is a claim of race discrimination cognizable under Title VII?

(2.) Is a claim of religion discrimination cognizable under Title VII?

(3.) Is a claim of Disparate Impact cognizable under Title VII?

(4.) Should a claim of pay discrimination only adjudicate under McDonald Douglas with the only criteria of step four being a white or not situated person not receiving a raise?

(5.) Should not a religious discrimination claim be adjudicated if there was a black/white disparity or (and) failure to accommodate?

(6.) Should not a race discrimination case be cognizable under Title VII if there is a difference in the number of overtime hours given a white person over a black person?

(7.) Should a case against the EEOC be cognizable if they acted ultra virus and committed Tort, Biven, and other Acts?

(8.) Should a dual employer relationship be judged by the Strict Eleventh Circuit theory of "Government Entities" or the EEOC standard and other circuits such as the Third Circuit which uses the standard of "who controls the work environment"?

(9.) If a case is decided on a legal point of law such as Sovereign Immunity, and the case had merit, should not a lawyer have been assigned?

QUESTIONS PRESENTED – Continued

(10.) Should a motion for summary judgement only be adjudicated on Rule 12(b)(6) a complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," sufficient to provide the defendant with "fair notice" of the claim and it Basis Fed. R. Civ. P. 8(a)(2)?

(11.) Is a retaliation claim preserved as long as it grew out of discrimination claim and was related to it under Title VII?

(12.) Can a claim of fraud and misrepresentation be adjudicated with a discrimination case?

(13.) Should an oral contract be enforced under Alabama Fraud and Misrepresentative Statues Article 20?

(14.) Should a case be dismissed as frivolous when there were several acts of discrimination committed by various actors (DSI, American, EEOC (Debra Leo, James Lee, etc)?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

DSI Security Company
Oak Street
Dothan, Alabama 36303

American Building Company
State Docks Road
Eufaula, Alabama 36027

Equal Employment Opportunity Commission
1801 L Street N.W.
Washington, D.C. 20507

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING PETITION	6
I. DUAL EMPLOYER	6
II. PRIMA FACIE CASE	8
III. PRETEXT	11
IV. RACE, RELIGION, DISPARATE IMPACT FAILURE TO ACCOMMODATE	13
V. RETALIATION	13
VI. COVENANT OF GOOD FAITH AND FAIR DEALING	14
VII. EEOC CHARGE	15
VIII. LAWYER FORMA PAUPERIS	17
IX. HOSTILE WORK ENVIRONMENT	17
CONCLUSION	19

TABLE OF APPENDICES

Opinion of the United States Court of Appeals for the Eleventh Circuit, filed June 3, 2009....App. 1

Judgment of the District Court of the United States for the Middle District of Alabama, Southern Division, filed March 21, 2008 for the EEOC .....App. 10

Opinion of the District Court of the United States for the Middle District of Alabama, Southern Division, filed June 26, 2008.....App. 12

Judgment of the District Court of the United States for the Middle District of Alabama, Southern Division, filed June 26, 2008.....App. 14

Recommendation of the Magistrate Judge of the United States District Court for the Middle District of Alabama, Southern Division, filed May 22, 2008 .....App. 16

Recommendation of the Magistrate Judge of the United States District Court for the Middle District of Alabama, Southern Division, on Summary Judgment filed May 21, 2008 .....App. 35

Corrected Order of the District Court of the United States for the Middle District of Alabama, Southern Division, filed March 24, 2008 .....App. 45

Judgment of the District Court of the United States for the Middle District of Alabama, Southern Division, filed March 21, 2008, for DSI Security Services, Inc. .....App. 47

TABLE OF APPENDICES – Continued

Order of the District Court of the United States for the Middle District of Alabama, Southern Division, filed July 7, 2008 ..... App. 49

Order of the District Court of the United States for the Middle District of Alabama, Southern Division, filed July 11, 2008 ..... App. 51

TABLE OF AUTHORITIES

Page

CASES

Beraha v. Baxter Health Care Corp., 956 F.2d 1436 (7th Cir. 1992) 5, 15

Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006) 5

Clifton A. Phillips Jr. v. Roy A. Girdich, Superintendent, Ut state correctional facility et al. (2nd Circuit, Oct. 21, 2004 – Doc. No. 04-0347-pr) 16

Clockedil v. New Hampshire Department of Corrections, ___ F.3d ___ (2001 WL 293201) (1st Cir. 2001) 13

Delucca v. Frontier System of America, 1089 – BR-93 5

Desert Palace Inc. d/b/a Caesars Palace Hotel & Casino v. Catharina F. Costa No. 02-679 (March 31, 2003) 9

EEOC v. Zippo Manufacturing Co., 713 F.2d 32 (3d Cir. 1983) 7

Farrell v. Planters Lifesavers Co., 206 F.3d 2.1 (3d Cir. 2000) 10

Filner v. Shapiro, 633 F.2d 139 (2d Cir. 1980).....5, 15

Ford v. Department of the Army, EEOC request No. (05980506 Dec. 6, 2001) 5

Gaines v. Department of the Army, EEOC Appeal No. 01A53152 (July 6, 2006).....5, 8

TABLE OF AUTHORITIES – Continued

Page

Gallegos v. Haggerty, Northern District of New York, 689 F. Supp. 93 (1988) 16

Green v. Elixer Industries, Inc., 407 F.3d 1163, 95 FEP 1151 (11th Cir. 2005).....18, 19

Industrial Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66 (Fla. 4th DCA 1983) 15

Leedom v. Kyne, 358 U.S. 184 (1958).....16

Mathieu v. Norrell Corp. et al., 2004 WL 309175 (Feb. 19, 2004), Cal. App. 2 Dist.....5, 6

Mozelle Jenkins v. Chemical Bank (No. 284 Docket 82-7167), 721 F.2d 876 (2d Cir. 1983) 17

Mulhall v. Advance Security, Inc., 29 F.3d 586 (11th Cir. 1994).....9

Oest v. Ill. Dept. of Corr., 240 F.3d 605 (7th Cir. 2001) 10

Peele v. Country Mutual Ins. Co., 228 F.3d 319 (7th Cir. 2002) 10

Piano v. Ameritech, ND. Ill. No. 02-c-3337 2/5/03 8

Rudin v. Lincoln Cmty. Coll., 420 F.3d 712 (7th Cir. 2005) 10

Swictkiewicz v. Sorema (N.A. 122 S. Ct. 992) (2002).....8

Talat Enterprises, Inc. v. Aetna Gas and Surety Co., 753 So. 2d 1278 (Fla. 2000) 15

OPINIONS BELOW

The opinion of the United States Court of Appeals at Appendix A to the petition and is unpublished. At *Roger Reeves v. DSI Security Services, American Buildings Company, EEOC American Buildings, Inc., et al.*

The opinion of the United States district court appears at Appendix B to the petition and is unpublished. At *Roger Reeves v. DSI Security Services, et al.*

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 3, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346. United States as defendant

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United

States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

ARTICLE 8

FRAUD, MISREPRESENTATION, AND DECEIT

§ 6-5-100. Fraud; right of action.

Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action.

§ 6-5-101. Fraud; misrepresentation of material fact.

Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently acted on by the opposite party, constitute legal fraud.

§ 6-5-102. Fraud; suppression of material fact.

Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

§ 6-5-103. Willful misrepresentation – Deceit.

Willful misrepresentation of a material fact made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

§ 6-5-104 Willful deceit with intent to induce injury or risk.

(a) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(b) A deceit within the meaning of this section is either:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true.

(2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing it.

STATEMENT OF THE CASE

Plaintiff (Roger Reeves) A black American male who is a member of the Pentecostal faith brought an Action in District Court, claiming that Defendants DSI, American Buildings and the EEOC discriminated against him. Plaintiff asserts that DSI and American Buildings discriminated against him in promising a wage increase and with fraudulent and discriminatory animus refused to give him the raise and later denied that they ever promise him one. Plaintiff claims that Defendants provided him with a race, religion, and hostile discriminatory environment. Plaintiff is claiming that DSI showed a racist tendentious view of Plaintiff since he started working.

Plaintiff has shown in District Court Document that he had more education, and more experience in Security work, but DSI showed discrimination by choosing someone less qualified and showed a

tendency toward whites and foreigners. DSI has shown discrimination against Plaintiff and other person (Pentecostal) with same religion whom they got rid of. Plaintiff has claim that DSI used collusion and Deceptive Practices in not giving Plaintiff the promised raise as well as in stating of an oral contract with Plaintiff and others. In *Ford v. Department of the Army*, EEOC request No. (05980506 Dec. 6, 2001) it shows case that shows deception that was adjudicated in Plaintiff's favor. Alabama Tort Law Chapter 20 and 21 states in *Filner v. Shapiro*, 633 F.2d 139 (2d Cir. 1980) states that the Covenant of Good Faith and Fair Dealing mandates that each party to an employment agreement must act reasonably with the other party. DSI and American Buildings did not do that and has Breached the Covenant and I pray that my rights would not be trampled on. (*Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436 (7th Cir. 1992)) (*DeLucca v. Frontier Systems of America*, 1089 – BR-93)

Plaintiff is also asserting that American Buildings is a Dual Employer per EEOC Document of Dual Employer on their web site. There statement of "Who Control the Work Environment" as the controlling Criteria who is a Dual Employer. In *Mathieu v. Norrell Corp. et al.*, 2004 WL 309175 (Feb. 19, 2004), Cal. App. 2 Dist. the Court of Appeal states that a temp Agency and its Client Company could both be liable as Dual Employee. *Chamberlain v. Department of the Army*, EEOC Appeal No. 01A61315 (June 26, 2006) states the same. *Gaines v. Department of the*

Army, EEOC Appeal No. 01A53152 (July 6, 2006) also states the same.

REASONS FOR GRANTING THE PETITION

Appellate Court and District Court has failed to follow the precedent of other Court in the following manner:

I. Dual Employers

II. Prima Facie Case

III. Pretext

IV. Race, Religion, Disparate Impact, Failure to Accommodate

V. Retaliation

VI. Covenant of Good Faith and Fair Dealings

VII. EEOC Charges

VIII. Lawyer Forma Pauperis

IX. Hostile Work Environment

I. Dual Employer

In *Mathieu v. Morrell Corp.*, *supra* the 4th Appellate Court ruled that an employment agency could both be liable as "dual Employers". The Court concluded that when a temporary worker is under the Control of both the placing agency and the client, a "dual employee" relationship exists. Even using the heightened 12 -- factor test implemented by the third

circuit in *EEOC v. Zippo* Manufacturing American Buildings would be my Employer

(1) The employee's right to control the means and manner of the worker's performance. American decides how trucks are to be checked in and out. How materials are to judged by Guards to be strapped down. When rounds are to be made. What doors are to be locked and unlocked.

(2) The kind of occupation ___ the manner in which work is to be done can change from day to day so they could be different order daily. "Who to let in, who not to let in" "Who or what is expected to show up"

(3) Skill ___ not highly skill work

(4) Who furnish the equipment and workplace ___ American furnish building and all material for work including the Time Clock

(5) The length and time individual has worked. I worked there for Five years when this matter brought

(6) Method of payment – check DSI. Hours sent to American to be reimbursed

(7) Termination of work relation ___ both took part in Chastisement reprimand of Employee (American).

(8) Annual leave – No annual leave

(9) Work is integral part of Employer Business

(10) Work did not accrue retirement benefits

(11) DSI pays Social Security Taxes

(12) Intention of parties

In *Gaines v. Department of the Army* the commission found that the agency exercised sufficient control over complaint's position for complaint to qualify as an employee for Title VII. District Court and Appellate Court error when they did not use Standard of other Circuits and EEOC *(Piano v. Ameritech, N.D. Ill.*, No. 02-c-3337, 2/5/03).

II. Prima Facie Case

District and Appellate Court erred when they used the strict McDonald Douglas Method, which was not applicable to this situation. Rule 8(a) only requires that the complaint gives the defendant fair notice of what the plaintiff claim is. The charge given to EEOC and District court states that plaintiff complain of a promised raise not given, fraud and lying in not giving it, religion discrimination, race in hours, discrimination, fraud in EEOC mediation, hostile work environment and religious discrimination. *Swictkiewicz v. Sorema* (NA. 122 S.Ct. 992)

Appellate Court also erred when they used other Guards at American as similarily situated comparator when they were not told there was a raise given or to be given, was not there when the fraudulent lie was told that it was a three year contract when

discovery was shown it was a one year contract. They were not expecting a raise. The plant worker under manager, John Howard was expecting and received three on time raises but Guard (3/4 black) most of the time were not given a raise. (*Mulhall v. Advance Security Inc.*, 29 F.3d 586, 599 (11th Cir. 1994). There was shown in Court Documents that American management have shown a tendency to give more hours to a white guard than myself, when he did not want to work. He (Dale Jones) (a white) told me that he did not want to work but John Howard insisted and Dale told them to ask me. An Employer of American told me that American Management did not like my Bible and a former employee that was the same religion that I was. This more than states a tendency to be slanted toward white and different toward plaintiff. A Prima Facie Case have been shown. (Supreme Court Case *Desert Palace Inc. d/b/a Caesars Palace Hotel & Casino v. Catharina F. Costa* No. 02-679 (March 31, 2003)).

There is not only one but several instances of Prima Facie Case within this suit DSI and American has shown a discriminatory attitude toward Plaintiff in giving overtime hours to white over Plaintiff, assigning excess time to Dale Jones (a white) over Plaintiff a black, allowing another white to take religion and church time off but not Plaintiff. A Black (Giles) allowed to take religious time off but not Plaintiff. American dislike of a mixed couple (black man and white woman) also state a Prima Facie Case. American has shown a biased toward black and

Plaintiff. A Prima Facie Case has been stated in all the above situations.

In *Farrell v. Planters Lifesave Co.*, 206 F.3d 2.1 (3d Cir. 2000), the third circuit hold the entire record, including evidence of pretext should be reviewed in determining whether a plaintiff has met the causation (or fourth) element of Prima Facie Case. If such was used a Prima Facie Case would be establish and Summary Judgement given Plaintiff. DSI has caught lying about knowing about Plaintiff religion and contract length as well as American and DSI lying about raise to be given. Two documents submitted showed signed signature of a DSI guard stating that DSI said it was a three year contract and a signed document showing that a DSI Guard attesting to hours being swapped so I could go to church. These are in answer to Magistrate Judge Reports for DSI and American.

The Seventh Circuit has recognized that the McDonald Douglas formulation is not relevant if those who evaluated the plaintiff's performance are accused of invidious discrimination. *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 (7th Cir. 2002); *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605 (7th Cir. 2001).

At summary judgement Plaintiff need only raise material issue of fact as to the believability of the employee's justification. Plaintiff need not also provide evidence of discriminatory motive. *(Rudin v. Lincoln Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005) American never answered so there is no disputed

facts and DSI said that they did not know I had any religious preference and lying about the length of contract.

III. Pretext

Disbelief of the Employer answer is grounds for dismissal and lying also. The employer DSI has been shown in Court Documents (Answer to Magistrate Judge Reports) that he was aware that I was taking time off for church because a swap with the second shift was done on Friday with Tiffany Flowers signing the Document. Their lying about their knowledge of my religion should warrant Summary Judgement for Plaintiff. DSI has lied about contract length, religion, promised wages, and shown discriminatory actions in overtime hour in giving Dale more hours (a white employee) and not rotating them), and requesting Dale Jones (a white) to work over Plaintiff. American has shown that they knew of, should have known that an action was against American and DSI. DSI would reasonably have told American and *should have* told American that an action was against DSI. The fact that DSI and the EEOC has been very hostile and are a party to this suit and inference is shown that American knew was served and a collusion with EEOC and DSI occurred. Since Mendacious lying has been shown with DSI and Collusion with them and EEOC and hostility against Plaintiff. Summary Judgement should have been awarded Plaintiff as a matter of law. (Mendacious, unbelief, collusion). (EEOC walking out of room with DSI).

EEOC failure and reluctancy to send (their words) American paperwork did not free them being a party to ADR mediation. They had a chance in District Court to mediate and was in charge of the mediation and failed to make any offer. American proved that they were not interested in any negotiating. Their only aim was to deceive and present a fraud on the court and waste valuable time and resources. I offered to settle it once with DSI for $1,000 so I could pay my medical bills, but they refused. They were not interested in any kind of negotiating. They only wanted to get me a Black that dare raise a charge against American and DSI. American did not want EEOC to send them paperwork. They wanted to have an excuse to later say that paperwork was not sent to them. EEOC initially told me that they had sent the paperwork to American. They later took back that statement and said that they were not my employer. An inference can be drawn that they EEOC and American was in collusion. A Prima Facie Case and Pretext with Mendaciousness is shown. Summary Judgement should have been awarded by Plaintiff as a matter of law.

John Howard (plant personnel manager for American) name is on the Document sent to DSI so American and John Howard was intended by Plaintiff to have been included in EEOC charge. John Howard name is also included in Document sent back to EEOC that they sent to me. The questions and answers are included in the EEOC Plaintiff's file.

IV. Race, Religion, Disparate Impact, Failure to Accommodate

District court failed to adjudicate Title VII case for race, religion, disparate Impact and failure to accommodate. Appellate Court also failed to consider my constant plea that my case was one of race, religion, failure to give promise raise, disparate impact. These pleas was raise in answers to summary Judgement and answer to magistrate Judge reports.

Plant workers under Personnel Manager John Howard were given three raises while the guards were put under the DSI security with no benefits and no promised raise. This shows disparate impact. A facial neutral policy that has a discriminatory effect on a protected group. American by assigning guard who were under American to DSI cause them to have no pension, no holiday, no raises, bad vacation and it was not business necessary to do that to four persons. (3) (40 Hour shifts and 8 hours). At issue is why four persons were put under DSI and lost all benefits.

V. Retaliation

Retaliation claims are preserved so long as the retaliation arises from the original matter complained of the EEOC. (*Clockedile v. New Hampshire Department of Correction,* ___ F.3d ___ (2001 WL 293201, 1st Cir. 2001).

None of the retaliation charges raise in the suit was evaluated. Some of these are:

1. Refusal to give same overtime hours after case filed with EEOC.
2. Having a mother of five work instead of Plaintiff on Thanksgiving Day (a double shift) and another day.
3. Leaving Plaintiff on phone and refusing to answer in a very stressful situation (Plaintiff having to go to Emergency Room).
4. DSI walking out of EEOC with ADR Neutral (James Lee) and showing collusion. An adverse action is such that it may well dissuade a reasonable worker from making a discrimination charge. DSI action would well dissuade a reasonable worker from filing a charge if he knew they could walk out of ADR. without any consequences.
5. EEOC removing how to correct neutrals that break rules from web site.

VI. Covenant of Good Faith and Fair Dealing

The covenant of Good Faith and Fair Dealing "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement." In essence the covenant mandates that each party to an employment agreement (written contract or one at will), must act reasonably with the other party.

DSI and American broke the covenant when they both promised they would give a raise and did not. DSI not willing to negotiate fairly at ADR (twice), and DSI lying about the length of the contract. Appellate and District Court failed to consider these actions by American and DSI. (*Beraha v. Baxter Health Care Corp.*, 956 F.2d 1443 (7th Cir. 1992); (*Filner v. Shapiro*, 633 F.2d 139 (2d Cir. 1980)). *Talat Enterprises, Inc. v. Aetna Gas and Surety Co.*, 753 So. 2d 1278 (Fla. 2000). *Industrial Fire & Gas Ins. Co. v. Romer*, 432 So. 2d 66 (Fla. 1983).

VII. EEOC Charge

A charge against the EEOC should have been adjudicated according to the law that they acted ultra virus and lost their shield. They had a mandate to (in their MD-710 section 7.3, 7.16, 7.10) be impartial and deal fairly and the Director must take specific action once a complaint against an employee is lodged. (Answer to magistrate Judge Report for EEOC:

> (Document 100-2 (Documents) (OIG Document)

Appellate Court erred when they stated that this action also could not be brought under another statute. (Tort or Bivens). I had already stated states statutes of Alabama that Debra Leo, James Lee, the Birmingham EEOC Director, OIG lawyer to EEOC (Tom), Byrdsong, Holloway and other EEOC actors committed. (Federal statutes also broken) (2635.902) (29 cpr1614)

Federal employees may be personally liable for constitutional deprivation by direct participation, failure to remedy wrongs after hearing about it, creation of a policy or gross negligence in managing subordinates who cause violations. (*Gallegos v. Haggerty*, Northern District of New York, 689 F. Supp. 93 (1988)). *Leedom v. Kyne*, 358 U.S. 184 (1958) MD 7:10 as well as 29 CPR 1614 were broken by EEOC Director and OIG lawyer (Tom)

Alabama Tort Statutes 20 and 21 were violated in the ADR process. These acts by EEOC participants were never adjudicated fairly. A plaintiff without legal representation only has to state enough facts that the judge can determine if he states enough where relief can be granted. He does not have to state legal laws and statutes because he cannot know all legal applicable theories. (*Clifton A. Phillips Jr. v. Roy A. Girdich*, Superintendent, Ut state correctional facility, et al.) (2nd Circuit, Oct. 21, 2004 – Doc. No. 04-0347 – pr)

Appellate Court also abused its discretion when it allowed the EEOC with instruction several times to correct their brief. This has greatly prejudice the plaintiff and allowed them to prevail when the plaintiff should have been awarded case by default. Appellate Court has allowed several briefs by EEOC and DSI. Court has departed from normal procedures for lawyers and allowed them to file their brief that was submitted in error. Plaintiff should have been awarded cases by *default*. Plaintiff was only allowed an extension to file briefs not a correction which is

not allowed for lawyers. EEOC was allowed to submit three briefs with corrections. Plaintiff was greatly prejudiced by the court's abuse of discretion.

VIII. Lawyer Forma Pauperis

The law states that if a case is decided such as this matter with EEOC on a law principle and a lawyer was not assigned, the case should be overturned and a lawyer assigned. A lawyer was requested twice and one was not assigned. Appellate did not assign lawyer and use wrong document when deciding in Forma Pauperis Status. These charges should be re-evaluated. District Court did not assign lawyer and should be reviewed for abuse of discretion. There were issues to be decided because EEOC and DSI had committed infractions and such was not due to be denied. A lawyer could have flushed out such issues and filled out the correct paperwork. Plaintiff did not have legal knowledge and had tried unsuccessfully to obtain an attorney.

Mozelle Jenkins v. Chemical Bank (No. 284 Docket 82-7167), 721 F.2d 876, 879 (2d Cir. 1983) United States Court of Appeals Second Circuit, (11,9,1983)

IX. Hostile Work Environment

District Court and Appellate court did not follow normal court precedent when they did not consider the statements made to EEOC was pointing to a

hostile work environment so even if it was not stated all points made were toward a hostile work environment. Some of these made to EEOC person include:

1. American allowing workers to wear X confederate Flag sewn on their clothing.
2. American Managers not answering CB until third of fourth time when blacks called, but first time when whites called on CB. They were creating a very dangerous environment. They were saying that blacks were inferior to whites, and whites could commit whatever acts they wanted to.
3. Plaintiff ridiculed when person (white) name Roger died by (shipping) manager.
4. Having plant worker to check mopped floor (greasy oily plant worker).
5. Derogatory comment about mixed married couples (Management not liking mixed married DSI guards) (overheard by American person).
6. Negative comments by American managers about Plaintiff's Bible. (Comments overheard by American Truck Driver).

In *Green v. Elixer* "Green stated enough on his EEOC charge to warrant an investigation of hostile work environment. It is inconsistent with Title VII expansion remedial aims to prevent Green radial harassment claim from preceding to trial because Green's statements on an administrative form might have been more exhaustive". The Green standard

should have been used in my case and was not. (*Green v. Elixer Industries, Inc.*, 407 F.3d 1163, 95 FEP 1151 (11th Cir. 2005). EEOC was very hostile and reluctant to take racial information given them. All the above hostile actions were given to EEOC person on the phone. Two appear in EEOC notes the mixed couple and religious statement about Plaintiff's Bible. Appellate Court did not use the same standard to adjudicate this matter.

CONCLUSION

There are genuine issues of material fact whether race was a factor in giving the promised raise. American had shown a racial tendency to be biased toward Plaintiff in giving overtime hours and requesting a white (Dale) over Plaintiff. Management of American had shown a tendency to ridicule and embarrass plaintiff when a gentleman named Roger died. They had embarrassed plaintiff by sending oily worker from Plant to inspect the mopped floor. DSI had showed a tendency to be discriminatory in the same manner (asking for Dale) and not assigning Plaintiff to full shift, when he was most qualified. DSI had been biased in paying wage when they pay me less than overtime when I worked more than forty hours. (Discovery Documents from DSI showing wages.)

There are genuine issues of material fact whether DSI and American had a religious bias

against Plaintiff. American had shown bias toward a previous American employee that was a Guard before American took over. This also appear to be the reason the Guards were shifted to DSI. Alan Wood (DSI Manager) stated that they were getting rid of two employees of American, a black pentecostal person and a woman. DSI refused to change hours so I could go to church on Wednesday, but when a white guard came on, his hours were changed to allow him Wednesday off for church. DSI also said in Court Document that they did not know I had any religious preference. There is a genuine issue of whether DSI that has shown lies in religious matters and about the length of the contract could truly give or be truthful about giving one (a promised wage).

In consideration of the above, the case should be granted (Summary Judgement) in the Plaintiff's favor and if it is remanded a new set of Judges should be assigned (District and Appellate).

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13777
Non-Argument Calendar

D. C. Docket No. 07-00616-CV-T-N

ROGER REEVES,

Plaintiff-Appellant,

versus

DSI SECURITY SERVICES,
AMERICAN BUILDINGS COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(June 3, 2009)

Before DUBINA, Chief Judge, TJOFLAT and BLACK, Circuit Judges.

PER CURIAM:

Roger Reeves, an African-American male who is a member of the Pentecostal faith, appeals, *pro se*, from the district court's dismissal with prejudice of his

claim against the Equal Employment Opportunity Commission (EEOC), and its grant of summary judgment in favor of American Buildings Company (ABC) and DSI Security Services, Inc. (DSI), in his employment discrimination suit under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a).

On appeal, Reeves argues the district court erred by dismissing his claims against the EEOC based on its finding (1) it lacked jurisdiction to hear these claims, and (2) Reeves' claim for monetary damages against the EEOC was barred by sovereign immunity. Reeves also argues the district court erred by granting summary judgment to DSI and ABC based on its finding Reeves had not established a *prima facie* case of discrimination or harassment.[1]

I. DISMISSAL OF CLAIMS AGAINST THE EEOC

Reeves argues the district court erred by dismissing with prejudice his claims against the EEOC – based, in part, on the agency's decision to

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[1] Reeves further argues the district court erred by denying his request for appointment of counsel. However, this case does not have exceptional circumstances that would require the appointment of counsel, and the core issues of this case – discrimination on the basis of race and religion and hostile work environment – are "not so unusual that the district court abused its discretion by refusing to appoint counsel." *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999).

walk out of a mediation session – because the claim was "very meritorious," and because the EEOC had a duty to mediate fairly but failed to do so.

We review *de novo* a grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, accept the allegations in the complaint as true, and construe them in the light most favorable to the plaintiff. *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000). When ruling on a Rule 12(b)(6) motion to dismiss, the court considers whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Granting a motion to dismiss is appropriate when it is demonstrated beyond a doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. The establishment of an employment relationship is required to obtain relief pursuant to Title VII. *Hishon v. King & Spalding*, 104 S. Ct. 2229, 2233 (1984); 42 U.S.C. § 2000e-2.

We also review *de novo* a sovereign's immunity from suit. *United States v. 1461 W. 42nd St., Hialeah, Fla.*, 251 F.3d 1329, 1334 (11th Cir. 2001). The Supreme Court has ruled sovereign immunity shields federal agencies from suit unless that agency waived sovereign immunity. *Dep't of the Army v. Blue Fox, Inc.*, 119 S. Ct. 687, 690 (1999).

Reeves does not argue, and the evidence does not suggest, the EEOC was his employer. Therefore, Title

VII did not allow him to obtain relief against the EEOC. *See Gibson v. Missouri Pac. R.R. Co.*, 579 F.2d 890, 891 (5th Cir. 1978)[2] ("Title VII . . . confers no right of action against the enforcement agency. Nothing done or omitted by EEOC affected [Plaintiff's] rights."). Furthermore, the EEOC is a federal agency, and there is no evidence in the record that the EEOC waived sovereign immunity. Therefore, Reeves is precluded from bringing suit against the EEOC under another provision of federal law. *See Blue Fox, Inc.*, 119 S. Ct. at 724. Thus, the district court did not err when it dismissed Reeves' complaint against the EEOC for failure to state a claim and because it was entitled to sovereign immunity.

II. SUMMARY JUDGMENT FOR DSI AND ABC

We review a district court's grant of summary judgment *de novo*. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). Issues not argued on appeal are deemed waived, and a passing reference in an appellate brief is insufficient to raise an issue. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989); *see also Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) (noting we do not address arguments raised for the first time, in a *pro se* litigant's reply brief). We liberally read briefs

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

filed by *pro se* litigants. *Lorisme v. I.N.S.*, 129 F.3d 1441, 1444 n.3 (11th Cir. 1997). However, the leniency afforded *pro se* litigants by liberal construction does not give the courts license to serve as *de facto* counsel or permit them to rewrite an otherwise deficient brief. *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998). Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Title VII explicitly prohibits discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). To prevail on a Title VII claim, a plaintiff must present (1) direct evidence of discrimination or (2) circumstantial evidence that creates an inference of discrimination. *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 827-28 (11th Cir. 2000). A plaintiff may also establish a *prima facie* case of discrimination by presenting statistical proof of a pattern of discrimination. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989).

Claims of racial discrimination based on circumstantial evidence are normally evaluated under the three-part, burden shifting framework of *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1824 (1973);

see also Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006). In *McDonnell Douglas,* the Supreme Court held that if an employee presents a *prima facie* case of racial discrimination against an employer, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 93 S. Ct. at 1824. The employee retains the ultimate burden of proof throughout the proceedings and must be given a fair opportunity to rebut the employer's reason with evidence that the explanation offered by the employer was a pretext for racial discrimination. *Id.* at 1825-26.

In order to present a *prima facie* case, an employee may "show that: (1) [he] is a member of a protected class; (2) [he] was subjected to an adverse employment action; (3) [his] employer treated similarly situated employees outside of [his] protected class more favorably than [he] was treated; and (4) [he] was qualified to do the job." *Burke-Fowler,* 447 F.3d at 1323. A *prima facie* case must be supported by "facts adequate to permit an inference of discrimination." *Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997). An adverse employment action is one that involves a serious and material change in the terms, conditions, or privileges of one's employment. *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001). "[T]he employee's subjective view of the significance and adversity of the employer's action is not controlling." *Id.* at 1239. Rather, a reasonable

person must find the action to be materially adverse. *Id.*

To establish a hostile environment claim, a plaintiff may establish that: (1) he belongs to a protected group; (2) he has been subjected to unwelcome harassment; (3) the harassment was based on his protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive work environment; and (5) the employer is responsible for the environment, either directly or vicariously. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002).

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). We treat the question of whether a defendant meets the statutory definition of "employer" as a threshold jurisdictional matter under Title VII. *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1359-60 (11th Cir. 1994) (discussing joint employer test). We liberally construe the term "employer" when determining whether a complainant may pursue his Title VII charge and may construe two "highly integrated" entities, "with respect to ownership and operations," to be an individual's single employer for Title VII liability. *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1341 (11th Cir. 1999) (discussing aggregating local governments as "single

employer"). Alternately, we may determine that two separate entities are an individual's single employer. To make such a determination, we consider the: "(1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control." *Id.*

An individual may not file a complaint regarding an alleged Title VII violation unless he first raises the claim in an EEOC charge. *Alexander v. Fulton Co.*, 207 F.3d 1303, 1332 (11th Cir. 2000). EEOC charges that are prepared without the assistance of counsel must be construed broadly, but a complaint is "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.*

With regard to DSI, the evidence showed DSI treated Reeves the same as the other security guards, and as far as Reeves' pay is concerned, he did not establish that he was treated differently because of his race or religion. In addition, even if DSI treated its security guards differently than other employees, Reeves cannot obtain relief because he never showed DSI did so because of one of the protected grounds. With respect to the mediation dispute, and the claim of discrimination arising from that, Reeves did not establish an adverse employment action because he did not show DSI's walking out of the session constituted a serious and material change in the terms or conditions of his employment. Therefore, Reeves failed to establish a *prima facie* case of discrimination. Finally, Reeves never exhausted his

administrative remedies regarding his hostile environment claim, thus the district court did not err by granting summary judgment on this claim, either.

With regard to ABC, the evidence showed Reeves did not have an employment relationship with ABC, thus he could not obtain relief from it pursuant to Title VII. Moreover, even if ABC is regarded as a co-employer, Reeves' claims fail substantially for the same reasons they failed against DSI and summary judgment was proper for DSI. Accordingly, the district court correctly awarded summary judgment to ABC on Reeves' claims for discrimination based on race and religion and providing a hostile work environment.

Upon review of the record and consideration of the parties' briefs, we affirm.

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 1:07cv616-MHT (WO)
DSI SECURITY SERVICES, et al.,	)	
Defendants.	)	

JUDGMENT

(Filed Mar. 21, 2008)

After an independent and de novo review of the record, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff Roger Reeves's objections (Doc. No. 100) are overruled.

(2) The magistrate judge's recommendation (Doc. No. 81) is adopted.

(3) Plaintiff Reeves's motion for summary judgment (Doc. No. 38) is denied.

(4) Defendant Equal Employment Opportunity Commission's motion to dismiss (Doc. No. 26) is granted.

(5) The claims against defendant Equal Employment Opportunity Commission are dismissed with prejudice.

(6) Defendant Equal Employment Opportunity Commission is dismissed with prejudice.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 21st day of March, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, INC., and AMERICAN BUILDINGS COMPANY,	)	1:07cv616-MHT (WO)
Defendants.	)	

OPINION

(Filed Jun. 26, 2008)

Plaintiff Roger Reeves filed this lawsuit asserting claims of various forms of discrimination against defendants DSI Security Services, Inc., and American Buildings Company. This lawsuit is now before the court on the recommendations of the United States Magistrate Judge that defendants' motions for summary judgment should be granted. Also before the court are Reeves's objections to the recommendations. After an independent and de novo review of the record, the court concludes that Reeves's objections should be overruled and the magistrate judge's recommendations adopted.

An appropriate judgment will be entered.

DONE, this the 26th day of June, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES, Plaintiff, v. DSI SECURITY SERVICES, INC., and AMERICAN BUILDINGS COMPANY, Defendants.	)	CIVIL ACTION NO. 1:07cv616-MHT (WO)

JUDGMENT

(Filed Jun. 26, 2008)

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff Roger Reeves's objections (Doc. No. 128) are overruled.

(2) The United States Magistrate Judge's recommendations (Doc. Nos. 123 & 124) are adopted.

(3) Defendants DSI Security Services, Inc.'s and American Buildings Company's motions for summary judgment (Doc. Nos. 97 & 102) are granted.

(4) Judgment is entered in favor of defendants DSI Security Services, Inc., and American Buildings Company and against plaintiff

Reeves, with plaintiff Reeves taking nothing by his complaint.

It is further ORDERED that costs are taxed against plaintiff Reeves, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 26th day of June, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07CV616-MHT
	)	
Defendants.	)	
	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

(Filed May 22, 2008)

Defendant DSI Security Services, Inc., headquartered in Dothan, Alabama, provides contract security services to a variety of businesses. One of these is defendant American Buildings Company's manufacturing plant in Eufaula, Alabama. Plaintiff Roger Reeves is employed by DSI as a guard at the American Buildings Company facility. (Sorrell dec.). Plaintiff, proceeding *pro se*, brings this Title VII action against American Buildings Company alleging that defendant discriminated against plaintiff on the basis of his race and religion by denying him a promised wage increase and by subjecting him to a hostile work environment. In a motion for summary judgment filed on March 21, 2008 (Doc. # 102), American Buildings contends that it cannot be liable to plaintiff on his Title VII claims because:

(1) plaintiff was employed solely by co-defendant DSI Security Services and not by American Buildings Company; (2) he failed to name American Buildings as a respondent in the charge he filed with the EEOC; (3) he failed to include any allegations of hostile environment in his EEOC charge; (4) he cannot establish a *prima facie* case of discrimination as to his wage claim because he cannot demonstrate that he was treated differently from similarly situated employees; (5) he cannot establish a *prima facie* case of discrimination as to his EEOC mediation claim because the circumstances of the mediation did not constitute an adverse employment action;[1] and (6) he cannot establish a *prima facie* case of discrimination as to his hostile environment claim because he cannot demonstrate that the discriminatory conduct was sufficiently severe or pervasive to support a hostile environment claim.

Plaintiff responds that: (1) American Buildings is liable to him as a "joint employer;" (2) he attempted to include American Buildings in the EEOC charge

---

[1] In his complaint, plaintiff alleges that defendant DSI discriminated against him by, *inter alia,* leaving the EEOC mediation with the mediator after the latter stated, "Let's get out of here," and "This cat does not know what he is doing." (Complaint, Doc. # 1, pp. 2-4). It does not appear to the court that this allegation pertains to defendant American Buildings. However, American Buildings has moved for summary judgment on this claim and, in response, plaintiff argues that American Buildings, as his "joint employer" is liable for DSI's conduct during the mediation. Accordingly, the court will address the claim in this recommendation.

form but was prevented from doing so by the "EEOC person," who "screamed and yelled" at the plaintiff that American Buildings was not his employer;[2] and (3) he raised a hostile environment claim with the EEOC when he stated that management made derogatory comments about a mixed-race couple and about plaintiff's carrying a Bible. Plaintiff argues that the facts establish his hostile environment claim and that his treatment during the EEOC mediation process constituted "quite an Adverse Employment Action" (Doc. # 116, p. 7), but he does not respond to defendant's argument that he cannot establish a *prima facie* case of discrimination with regard to his wage claim. Upon consideration of the motion for summary judgment, the court concludes that it is due to be granted.

THE SUMMARY JUDGMENT STANDARD

A party seeking summary judgment bears the initial burden of demonstrating to the court the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories,

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[2] Plaintiff's brief/declaration (Doc. # 116), p. 1; *see also* Plaintiff's brief/declaration in opposition to DSI's motion for summary judgment (Doc. # 114) at pp. 4-5 ("[W]hen I asked why [American Buildings was] removed from the charge the EEOC 'yelled' and 'screamed' more than once that they were not my Employer after I told her that they were my Employer as much as DSI was."); *see also* Complaint (Doc. # 1), p. 6 ("EEOC did not aggresively [sic] pursue action against American Buildings when I file [sic] my charge.").

and admissions that it believes show an absence of any genuine issue of material fact. *Hairston v. Gainesville Publishing Co.,* 9 F.3d 913 (11th Cir. 1993). For issues on which the non-movant bears the burden of proof at trial, "the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim in order to discharge this initial responsibility. Instead, the moving party simply may show [] – that is, point[] out to the district court – that there is an absence of evidence to support the non-moving party's case." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115-16 (11th Cir. 1993) (quoting *U.S. v. Four Parcels of Real Property,* 941 F.2d 1428, 1437-38 (11th Cir. 1991) (*en banc*)).

In *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), the Court held that if a party opposing summary judgment "fails to make a showing sufficient to establish the existence of an element essential to their party's case, and on which their party will bear the burden of proof at trial," summary judgment shall be granted.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue . . . Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial . . . We do not mean that the nonmoving party must produce evidence in a form that would be

> admissible at trial in order to avoid summary judgment. . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56 except the mere pleadings themselves. . . ."

Id. at 324.

For summary judgment purposes, an issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Electrical Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must view the evidence, and all factual inferences properly drawn from the evidence, in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). It is improper for this court to weigh conflicting evidence or make credibility determinations; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant

summary judgment." *Barfield v. Brierton,* 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted).

DISCUSSION[3]

Disparate Treatment Claims

Plaintiff has not argued that his claims of race and religious discrimination are supported by direct evidence of discriminatory intent, nor has he filed any such direct evidence. The *McDonnell Douglas/ Burdine*[4] framework was established by the Supreme Court for evaluating a Title VII plaintiff's claims of discrimination against an employer where, as here, there is no direct evidence of discrimination. *See Combs v. Plantation Patterns,* 106 F.3d 1519, 1527-28 (11th Cir. 1997). The plaintiff must first make out a *prima facie* case of discrimination. *Burdine,* 450 U.S. at 252-53; *Walker v. Mortham,* 158 F.3d 1177, 1183 (11th Cir.1998); *Combs,* 106 F.3d at 1527-28. "Establishment of the *prima facie* case in effect

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[3] Plaintiff has signed his response to the motion for summary judgment under penalty of perjury. Accordingly – to the extent the response includes factual assertions – the court treats the text of plaintiff's response as a declaration in accordance with 28 U.S.C. § 1746. Additionally, because the court concludes that plaintiff's claims fail on the merits – i.e., that he has failed to establish a *prima facie* case of discrimination as to his claims against defendant American Buildings – the court does not reach defendant's remaining arguments.

[4] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* (quoting *Burdine,* 450 U.S. at 254); *Walker, supra.*

If the plaintiff establishes a *prima facie* case, the employer has the burden of producing "legitimate, non-discriminatory reasons for the challenged employment action." *Combs,* 106 F.3d at 1528 (citing *McDonnell Douglas,* 411 U.S. at 802). "To satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Combs,* 106 F.3d at 1528 (quoting *Burdine,* 450 U.S. at 257). If the employer articulates a legitimate, nondiscriminatory reason for its decision, the mandatory inference of discrimination arising from the *prima facie* case is destroyed. *Walker,* 158 F.3d at 1184. The plaintiff must then produce evidence "including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Combs,* 106 F.3d at 1528.

Defendant argues that it is entitled to summary judgment on plaintiff's disparate treatment claims because plaintiff has not established a *prima facie*

case of discrimination. "A plaintiff establishes a *prima facie* case of disparate treatment by showing that [he] was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside the protected class. The methods of presenting a *prima facie* case are not fixed; they are flexible and depend to a large degree upon the employment situation." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). A plaintiff may establish a *prima facie* case without pointing to a similarly situated comparator, if he introduces evidence of other facts which are adequate to permit an inference of discrimination. *See Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997) ("If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate *where no other evidence of discrimination is present.*) (emphasis added).

Plaintiff claims that the defendants denied him a promised wage increase because of his race and/or religion. In a Recommendation entered on February 29, 2008 on defendant DSI's motion for summary judgment, the undersigned Magistrate Judge concluded that plaintiff had failed to establish a *prima facie* case of discrimination on the basis of either his race or his religion as to his wage claim because he failed to produce evidence that any similarly situated comparator of a different race or religion was treated more favorably with regard to pay increases, and he did not produce any other evidence sufficient to

permit an inference of discrimination. (Doc. # 83, p. 7). With regard to plaintiff's claim that defendant behaved in a discriminatory manner during the EEOC mediation process, the court determined that plaintiff could not establish a *prima facie* case because he could not demonstrate that defendant's conduct during the EEOC mediation constituted an adverse employment action. (*Id.*, pp. 7-8).[5]

In response to the present motion, plaintiff argues that pointing out a similarly situated comparator is not the only way to establish a *prima facie* case. (Doc. # 116, p. 8). He states that "American management has made derogatory statements about mixed couple, ask for member not of protected class to work, dislike employee with same religion" (*id.*), and suggests that this evidence permits an inference of bias. With regard to his EEOC mediation claim, plaintiff argues that EEOC is liable for acts of discrimination committed by DSI because they are "joint employers." He further contends that "[a]n adverse employment action does not have to occur on company property to be an adverse employment action. I suffered loss (financial loss) and lost my right under EEOC (ADR). I would think that would be quite an Adverse Employment Action." (Doc. # 116, p. 7). In reply, American Buildings argues that some of plaintiff's statements do not demonstrate personal

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[5] The District Judge adopted the recommendation in a judgment entered on March 21, 2008 (Doc. # 104).

knowledge, others are conclusory, and the remaining statements do not establish plaintiff's claims.

To be considered on summary judgment, a supporting affidavit or declaration "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant [or declarant] is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). To defeat a properly made and supported motion for summary judgment, the opposing party "must – by affidavits or as otherwise set out in [Rule 56] – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The Eleventh Circuit has "'consistently held that conclusory allegations without specific supporting facts have no probative value.'" *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (quoting *Evers v. General Motors Corp.*, 770 F.2d 984, 985 (11th Cir. 1985)); *see also Miller v. Citizens Security Group, Inc.*, 116 F.3d 343, 346 (8th Cir. 1997) ("A conclusory statement in an affidavit, however, cannot create a genuine issue of material fact which precludes summary judgment.").

In his responsive brief/declaration, plaintiff identifies acts which he contends support his hostile environment claim. The court has considered these statements to determine whether they are sufficient to permit an inference of discrimination as to plaintiff's wage or EEOC mediation claims. As noted above, plaintiff states that "American management has made derogatory statements about mixed couple, ask for member not of protected class to work, dislike

employee with same religion" (Doc. # 116, p. 8). He further testifies by declaration as follows:

> Other Acts of Hostile Work Environment
>
> (1) Allowing wearing of Confederate Flag on Clothing
>
> (2) Management not answering CB when Black person call until third or fourth time (American)
>
> (3) White Employee not coming out after hours when call at home for Emergency
>
> (4) Derogatory Remarks about Plaintiff And his Bible
>
> (5) American Preference in assigning Hour (white over Plaintiff when White Person (Dale Jones) did not want to work. (John Howard)
>
> (6) No giving promised Raise when he said DSI had the Papework [sic] (John Howard made that statement)
>
> (7) Intimi[dating] DSI Management into writing a bad Review. (John Howard) (Management)
>
> (8) Negative remarks about Previous Black Employee
>
> (9) Sending Plant Worker Out to Inspect Moped [sic] Floor
>
> (10) American Building has asked for specific employees to work. They have ask and assigned employees not in the protected

> class who did not want to work over Plaintiff who wanted to work.
>
> (11) Indirectly DSI Salary to Guard are determine by the rate American Pay DSI.
>
> (13)[6] In original Complaint American was name [sic] as Employer and the Reference to John Howard is that of Personnel Coordinator of American Building. In complaint "other Employees From American have Received raises".
>
> (14, 15) Again America [sic] had knowledge and ample Opportunity via DSI Lawyer + Representatives. DSI Lawyer made sworn statement that he had Discussions with American and they tender an offer which they implemented (.50/second pay period in January 2007) (EEOC said charge was sent to American Buildings) Two counts of Discrimination that occured [sic] on American Building [sic] Plant Site are alluded to in EEOC Documents. (SEE Document 2)

(Plaintiff's response, Doc, # 116, pp. 4-5).

Even assuming *arguendo* that plaintiff's failure to receive a wage increase and that DSI's conduct in leaving the room with the mediator during the EEOC mediation may be attributed to defendant American Buildings, plaintiff's responsive declaration is insufficient to permit an inference that

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[5] There is no item designated "12." (Doc. # 116, p. 5).

defendant American Buildings discriminated against the plaintiff on the basis of either his race or religion. First, plaintiff's declaration does not provide any basis for concluding that plaintiff has personal knowledge of any of the "facts" he has identified, with the exception of his statement that a person outside his protected class was assigned to work a shift that plaintiff wanted to work.[7] Further, some of plaintiff's statements are entirely conclusory – *e.g.*, "Derogatory Remarks about Plaintiff And his Bible," and "Negative remarks about Previous Black Employee." Other statements appear to constitute argument only rather than statements of fact (statements numbered "13" and "14, 15").[8] The remaining statements fail to provide sufficient factual context or detail to permit an inference of racial or religious bias, and the court has located no evidence elsewhere in plaintiff's responsive declaration or in the record which would permit such an inference.

Additionally, with regard to plaintiff's claim that American Buildings is liable for DSI's conduct during the EEOC mediation, the court concludes that plaintiff has failed to establish – despite his allegations of

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[7] Plaintiff's statement that a white employee, Dale Jones, did not want to work clearly is not within plaintiff's personal knowledge and, to the extent that the information came from Jones, is inadmissible hearsay.

[8] To the extent that they include any factual assertions, those facts do not – alone or in combination with the other factual assertions in plaintiff's responsive declaration – permit an inference of unlawful bias.

financial loss[9] and loss of his "right under EEOC (ADR)" – that DSI's conduct during the mediation constitutes an adverse employment action. *See Osahar v. Postmaster General of U.S. Postal Service,* 2008 WL 123959, *7 (11th Cir. Jan. 15, 2008) ("An adverse employment action must effect 'a serious and material change in the terms, conditions, or privileges of employment.' Further, regardless of the employee's subjective view, 'the employment action must be materially adverse as viewed by a reasonable person in the circumstances.'") (unpublished opinion) ((quoting *Davis v. Town of Lake Park, Fla.,* 245 F.3d 1232, 1239 (11th Cir. 2001)) (footnote omitted).

Accordingly, plaintiff has failed to establish a *prima facie* case as to his wage claim or his EEOC mediation claim, and American Buildings is entitled to summary judgment on these claims.

Hostile Work Environment Claim

Plaintiff claims, in conclusory terms, that defendant subjected him to a hostile work environment. (Complaint, Doc. # 1 at pp. 1, 6; Amended Complaint, Doc. # 22 at pp. 1, 5). Defendant argues that it is entitled to summary judgment on this claim because, *inter alia,* plaintiff cannot establish that he was

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[9] *See* Plaintiff's responsive declaration at p. 7. Plaintiff states that he suffered "financial loss" but does not specify the nature of that loss, how it was caused by DSI's conduct during the mediation, or how it relates to his employment.

subjected to harassment which was sufficiently severe or pervasive to support a hostile environment claim. (Defendant's brief, Doc. # 103, p. 17 n. 4). Plaintiff responds by pointing to his discipline by DSI. (Doc. # 116, p. 3). He then sets out the list of numbered items quoted above.

To establish his hostile environment claim, plaintiff must establish that: (1) he belongs to a protected group; (2) has been subjected to unwelcome harassment; (3) the harassment was based on his protected characteristic (in this case, his race or religion); (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) American Buildings is responsible for the environment, either directly or vicariously. *McCann v. Tillman* ___ F.3d ___, 2008 WL 1991172 (11th Cir. May 9, 2008) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)).

> Determining whether the harassment was sufficiently severe or pervasive involves "both an objective and subjective component." In determining the objective element, a court looks to "'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"

McCann, supra, 2008 WL 1991172 at *7 (citations omitted).

Plaintiff bears the burden of establishing the "severe or pervasive" element of his claim, and he has provided little competent evidence of his working conditions. Plaintiff's discipline by DSI and his failure to receive a wage increase – even assuming that American Buildings exercised control over these employment decisions – are discrete acts which "must be challenged as separate statutory discrimination . . . claims." *Id.* "These cannot be brought under a hostile work environment claim that centers on 'discriminatory intimidation, ridicule, and insult.'" *Id.* (quoting *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 116 (2002)). Even if the court considers these acts as part of the basis for plaintiff's hostile environment claim, however, the claim still fails.[10]

As discussed previously, plaintiff's responsive declaration suffers from a number of evidentiary deficiencies, including its failure to demonstrate that plaintiff's averments are based on his personal knowledge. Additionally, even assuming that the statements contained in the declaration are based on plaintiff's personal knowledge, they lack sufficient specificity to permit a conclusion that plaintiff's

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[10] As noted above, plaintiff has failed to produce evidence which would permit an inference that these actions were motivated by bias against plaintiff's race or religion.

working environment was "'permeated with "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to alter the terms and conditions of [his] employment and create an abusive working environment."'" *Morgan, supra,* 536 U.S. at 116. Plaintiff does not provide specific facts regarding the period of time over which these incidents occurred, whether they occurred in his presence, the number of times the alleged acts occurred, and the specific circumstances of the acts. *See* Doc. # 116. For instance, plaintiff lists "Negative remarks about Previous Black Employee," (Doc. # 116, p. 4), but does not state the number or substance of those remarks or whether he personally heard the remarks. Similarly, as to many of the incidents, it is impossible to determine from the sketchy outline provided in plaintiff's declaration whether they involved any overtly race-based or religion-based comments, or conduct which would contribute to the severity of the acts – *e.g.*, "Sending Plant Worker Out to Inspect Moped [sic] Floor," "White Employee not coming out after hours when call at home for Emergency," or "Management not answering CB when Black person call until third of fourth time."

Upon review of the record, the court concludes that plaintiff has failed to demonstrate, through the introduction of competent evidence, the existence of a genuine issue of material fact regarding whether he was subjected to discriminatory harassment which was sufficiently severe or pervasive to alter the terms and conditions of his employment. Accordingly,

defendant American Buildings Company is entitled to summary judgment on plaintiff's hostile work environment claim.

CONCLUSION

For the foregoing reasons, it is the RECOMMENDATION of the Magistrate Judge that defendant's motion for summary judgment (Doc. # 102) be GRANTED, and that plaintiff's claims against defendant American Buildings Company be DISMISSED with prejudice.

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve a copy on the parties to this action. The parties are DIRECTED to file any objections to this Recommendation on or before June 6, 2008. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Resolution Trust Co. V. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th

Cir. 1993); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989).

DONE, this 22nd day of May, 2008.

/s/ Susan Russ Walker
SUSAN RUSS WALKER
CHIEF UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07cv616-MHT
	)	
Defendants.	)	
	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

(Filed May 21, 2008)

By order entered March 21, 2008, this court dismissed Title VII claims brought by plaintiff Roger Reeves, proceeding *pro se*, against defendant DSI Security Services alleging that defendant discriminated against plaintiff on the basis of his race and religion by denying him a promised wage increase and by leaving the room during an EEOC mediation. Plaintiff's sole remaining claim against DSI is that defendant discriminated against him on the basis of his race and religion by creating a hostile work environment. This action is presently before the court on DSI's motion for summary judgment as to this claim. Upon consideration of the motion, the court concludes that it is due to be granted.

THE SUMMARY JUDGMENT STANDARD

A party seeking summary judgment bears the initial burden of demonstrating to the court the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions that it believes show an absence of any genuine issue of material fact. *Hairston v. Gainesville Publishing Co.,* 9 F.3d 913 (11th Cir. 1993).

For summary judgment purposes, an issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Electrical Industrial Company v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The court must view the evidence, and all factual inferences properly drawn from the evidence, in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.,* 951 F.2d 1235, 1237 (11th Cir. 1992); *Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1528 (11th Cir. 1987). It is improper for this court to weigh conflicting evidence or make credibility determinations; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson,* 477 U.S. at 255. Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of

material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted).

Where the moving party will bear the burden of proof at trial,

> that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to summary judgment unless the non-moving party, in response, come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) (*en banc*)).

DISCUSSION

"Prior to filing a Title VII action . . . a plaintiff first must file a charge of discrimination with the EEOC. The purpose of this exhaustion requirement 'is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts.'" *Gregory v. Georgia Department of Human Resources*, 355 F.3d 1277, 1279 (11th Cir. 2004) (citations omitted). Defendant contends that plaintiff has not

exhausted administrative remedies as to the hostile environment claim he now asserts in this action.

"A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 589 n. 8 (11th Cir. 1994) (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)). "The starting point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation." *Eastland v. Tennessee Valley Authority*, 714 F.2d 1066, 1067 (11th Cir. 1983) (citing *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 927 (11th Cir. 1983)). "'[T]he allegations in a judicial complaint filed pursuant to Title VII "may encompass any kind of discrimination *like or related* to the allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission."'" *Eastland, supra*, 714 F.2d at 1067 (quoting *Sanchez, supra*, 431 F.2d at 466) (emphasis in *Eastland*).

In the charge he filed with the Equal Employment Opportunity Commission on September 22, 2006, plaintiff checked boxes on the charge form to indicate that he alleged discrimination on the basis of his race and religion. Plaintiff asserted:

> I began my employment with the employer named above as a security guard on February 2, 2002. During the year of 2005, I was promised a wage increase by Allen Wood, Supervisor. During the year of 2006, I

> was promised a wage increase by Mr. Wood and John Howard, Personnel Coordinator. Although I was promised a wage increase I have not been given a wage increase. I have not been given a reason as to why I have not been given a wage increase.
>
> I believe that I was discriminated against in violation of Title VII of the 1964 Civil Rights Act, as amended because of my race, Black and my religion, Pentecostal.

(EEOC charge, attached to Complaint, Doc. # 1). Plaintiff indicates elsewhere on the form that the discrimination took place between June 1, 2005 and June 1, 2006. There are no other factual allegations on the charge form.

Plaintiff argues that the EEOC charge file demonstrates that he asserted a claim of hostile work environment before the EEOC. He points to two statements in the notes of the intake worker: (1) "A member of mgmt made a statement to another employee about PCP's religion[,]" and (2) "Supr type made negative comments about a white female who was married to a Black." (Doc. # 114, plaintiff's response to motion, p. 1 and attachment 1). Plaintiff indicates that these are the only statements relating to his hostile environment claim in the charge file, and that "[t]he intake person was very reluctant to take information about racial acts when given to her." (Doc. # 114, pp. 1-2).

Plaintiff suggests that he provided additional "particulars" to the EEOC in response to questions

the EEOC submitted to plaintiff. In response to the present motion, plaintiff did not include or describe the information he provided to the EEOC, and he did not submit a copy of the questions propounded to him by the EEOC or his answers to those questions. However, plaintiff attached these documents to a response he later filed to the motion filed by co-defendant American Buildings Company. (*See* "Document 11" attached to Doc. # 116). With regard to the statement about plaintiff's religion, plaintiff wrote, "I belong to a Pentecoastol [sic] Holiness Church. I was told by other Employees that Supervisiors [sic] said that my Religion was a Problem." Plaintiff provided no additional facts to the EEOC regarding the context of the statement regarding plaintiff's religion, and no other examples of allegedly harassing conduct by defendant. Other than the two statements referenced in the intake notes – one of which is also included in plaintiff's response to the EEOC's questions – plaintiff has submitted no evidence that he reported any race-based or religion-based acts or statements to the EEOC, either to the allegedly reluctant intake worker or in response to the EEOC questionnaire. As to the two statements, plaintiff has provided no additional evidence regarding the factual context of the statements, such as when the statements were made, whether plaintiff was present, or the language used by the speaker.

The intake worker's notes, plaintiff's responses to the EEOC's written questions, and the actual EEOC charge sheet do not indicate that plaintiff

expressly claimed that his employer discriminated against him by creating a hostile work environment. To establish a hostile environment, harassment must be "'sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment[.]'" *McCann v. Tillman, et al.*, ___ F.3d ___ 2008 WL 1991172 (11th Cir. May 9, 2008) (quoting *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)).

> Determining whether the harassment was sufficiently severe or pervasive involves "both an objective and subjective component." . . . In determining the objective element, a court looks to "'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'

McCann, supra (citations omitted). Even assuming that the two statements referenced in the intake notes may properly be attributed to defendant DSI, the information provided by plaintiff to the EEOC (as reflected in the intake notes and the charge) is not even arguably sufficient to alert the EEOC to the possibility of a hostile environment.

The Eleventh Circuit has held that an allegation of discrimination through a tangible employment action is not "like or related" to and does not "grow

out of" an allegation of discrimination premised solely on a hostile work environment, stating that "[t]hose theories are wholly distinct and represent entirely different ways of demonstrating a violation of Title VII." *Minix v. Jeld-Wen, Inc.* 237 Fed. Appx. 578, 587-88 (11th Cir. Jun 27, 2007) (unpublished opinion); *see also Swanson v. Civil Air Patrol,* 37 F.Supp.2d 1312, 1321-22 (claims of unequal pay on the basis of gender are not like or related to claims of hostile environment sexual harassment). The converse is also true – a hostile environment claim is not "like or related to" a claim that plaintiff was discriminatorily denied a wage increase. *See Ramon v. AT& T Broadband,* 195 Fed. Appx. 860, 863-66 (11th Cir. Aug. 31, 2006) (finding plaintiff's judicial allegations of hostile work environment were not like or related to allegations in EEOC charge regarding discriminatory denial of disability leave and elimination of bilingual pay adjustment and stating, "[Plaintiff] has pointed to no allegation in her EEOC charge that reasonably points to the kind of pervasive and oppressive conditions that would allow us to conclude that she intended to have the EEOC investigate the workplace for a hostile work environment.").

Plaintiff has produced no evidence that the EEOC's investigation actually encompassed the hostile work environment claims plaintiff now brings in this court, and no evidence that he ever made allegations or provided evidence to the EEOC that should reasonably have alerted the EEOC to the

existence of such a claim. Under these circumstances, plaintiff has failed to exhaust administrative remedies as to his hostile environment claim and may not now prosecute that claim in this court.

CONCLUSION

For the foregoing reasons, it is the RECOMMENDATION of the Magistrate Judge that defendant DSI's motion for summary judgment (Doc. # 97) be GRANTED and that plaintiff's hostile work environment claim against defendant DSI be DISMISSED with prejudice.

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve a copy on the parties to this action. The parties are DIRECTED to file any objections to this Recommendation on or before June 4, 2008. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Resolution Trust Co. V. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th

Cir. 1993); *Henley v. Johnson,* 885 F.2d 790, 794 (11th Cir. 1989).

Done, this 21st day of May, 2008.

/s/ Susan Russ Walker
SUSAN RUSS WALKER
CHIEF UNITED STATES
MAGISTRATE JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07cv616-MHT
Defendants.	)	

CORRECTED ORDER

(Filed Mar. 24, 2008)

After an independent and de novo review of the record, it is ORDERED as follows:

(1) Plaintiff Roger Reeves's objections (Doc. No. 99) are overruled.

(2) The magistrate judge's recommendation (Doc. No. 78) is adopted.

(3) Plaintiff Reeves's motion for summary judgment (Doc. No. 37) is denied.

(4) Defendant American Buildings Company's *motion to dismiss* (Doc. No. 18) is denied.

(5) This cause is referred back to the magistrate judge for further appropriate proceedings.

DONE, this the 24th day of March, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07cv616-MHT
Defendants.	)	

JUDGMENT

(Filed Mar. 21, 2008)

After an independent and de novo review of the record, it is ORDERED as follows:

(1) Plaintiff Roger Reeves's objections (Doc. No. 101) are overruled.

(2) The magistrate judge's recommendation (Doc. No. 83) is adopted.

(3) Plaintiff Reeves's motion for summary judgment (Doc. No. 35) is denied.

(4) Defendant DSI Security Services, Inc.'s motion for summary judgment (Doc. No. 15) is granted as to plaintiff Reeves's Title VII claims that defendant DSI Security Services, Inc. discriminated against him on the basis of his race and

religion by (a) failing to give him a pay increase and (b) lying to the EEOC and leaving the EEOC mediation with the EEOC investigator; and summary judgment is entered in favor of defendant DSI Security Services, Inc. and against plaintiff Reeves as to these claims.

(5) That plaintiff Reeves's remaining claims against defendant DSI Security Services, Inc., are referred back to the magistrate judge for further appropriate proceedings.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 21st day of March, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07cv616-MHT
Defendants.	)	

ORDER

(Filed Jul. 7, 2008)

This cause is now before the court on plaintiff's motion to proceed on appeal in forma pauperis (doc. no. 133).

28 U.S.C. § 1915 (a) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." In making this determination as to good faith, a court must use an objective standard, such as whether the appeal is "frivolous," *Coppedge v. United States*, 369 U.S. 438, 445 (1962), or "has no substantive merit." *United States v. Bottoson*, 644 F.2d 1174, 1176 (5th Cir. Unit B May 15, 1981) (per curiam), *cert. denied*, 454 U.S. 903 (1981); *see also Rudolph v. Allen*, 666 F.2d 519, 520 (11th Cir. 1982) (per curiam), *cert. denied*, 457 U.S. 1122 (1982); *Morris v. Ross*, 663 F.2d

1032 (11th Cir. 1981), *cert. denied,* 456 U.S. 1010 (1982). Applying this standard, this court is of the opinion, for the reasons stated in the recommendation of the magistrate judge, that the plaintiff's appeal is without a legal or factual basis and, accordingly, is frivolous and not taken in good faith. *See, e.g., Rudolph v. Allen, supra; Brown v. Pena,* 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd without opinion* 589 F.2d 1113 (5th Cir. 1979).

Accordingly, it is ORDERED that the plaintiff's motion to proceed on appeal in forma pauperis be and it is hereby denied; and that the appeal in this cause be and it is hereby certified, pursuant to 28 U.S.C. § 1915(a), as not taken in good faith.

DONE, this the 7th day of July, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

ROGER REEVES,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
DSI SECURITY SERVICES, et al.,	)	1:07cv616-MHT
Defendants.	)	

ORDER

(Filed Jul. 11, 2008)

This cause is now before the court on plaintiff's amended notice of appeal (Doc. No. 135) which is treating as an amended motion to proceed on appeal in forma pauperis.

28 U.S.C. § 1915(a) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." In making this determination as to good faith, a court must use an objective standard, such as whether the appeal is "frivolous," *Coppedge v. United States*, 369 U.S. 438, 445 (1962), or "has no substantive merit." *United States v. Bottoson*, 644 F.2d 1174, 1176 (5th Cir. Unit B May 15, 1981) (per curiam), *cert. denied*, 454 U.S. 903 (1981); *see also Rudolph v. Allen*, 666 F.2d 519, 520 (11th Cir. 1982) (per curiam), *cert.*

denied, 457 U.S. 1122 (1982); *Morris v. Ross,* 663 F.2d 1032 (11th Cir. 1981), *cert. denied,* 456 U.S. 1010 (1982). Applying this standard, this court is of the opinion, for the reasons stated in the recommendations of the magistrate judge, that the plaintiff's appeal is without a legal or factual basis and, accordingly, is frivolous and not taken in good faith. *See, e.g., Rudolph v. Allen, supra; Brown v. Pena,* 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd without opinion* 589 F.2d 1113 (5th Cir. 1979).

Accordingly, it is ORDERED that the plaintiff's amended motion to proceed on appeal in forma pauperis be and it is hereby denied; and that the appeal in this cause be and it is hereby certified, pursuant to 28 U.S.C. § 1915(a), as not taken in good faith.

DONE, this the 11th day of July, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

No. 09-283

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROGER REEVES,

Petitioner,

vs.

DSI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

ROGER REEVES, *Pro Se*
B-12 Chatt. Court
Eufaula, AL 36027
(334) 687-7336

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
PETITION FOR REHEARING 1
CONCLUSION 4
CERTIFICATION 6

TABLE OF AUTHORITIES

Page

CASES

Farrell v. Planters Lifesavers Co., 206 F.3d 2.1 (3rd Cir. 2000) 2

Gaines v. Department of the Army, EEOC APPEAL No. 01A53152 (July 6, 2006) 2, 5

Green v. Elixer Industries, Inc., 407 F.3d 1163, 95 FEP 1151 (11th Cir. 2005) 5

Haywood Williams, Jr. v. Federal Bureau of Prisons and Parole Commission Appellate for the Third District No. 00-1986 (Nov. 7, 2003) 4

Mathieu v. Norrell Corp. et al., 2004 WL 309175 (Feb. 19, 2004), CAL App. 2 Dist. 2

Piano v. Ameritech, N.D. Ill. No. 02-c-3337 (2/5/03) 2

Roger Reeves, Petitioner v. Sanderson Plumbing Products, Inc., U.S. Supreme Court, No. 99-536 (June 12, 2000) 2

PETITION FOR REHEARING

Pursuant to Rule 44.1, petitioner respectfully petitions this court for rehearing.

I.

Since the words of the Plaintiff are to be believed and all inferences are to be drawn in the light most favorable to the Plaintiff and this standard was not used to adjudicate Plaintiff's case before District Court and Appellate Court, Plaintiff is asking for a rehearing.

District and Appellate Courts have not followed their own standard and standard of other District and Appellate Courts when adjudicating this matter. (See Writ pages 6-19).

If the decision to not hear the Writ is allowed to stand a discrimination claim of race, religion, and disparity impact would be allowed to stand without being adjudicated. This would allow the Court to decide what claims they want to adjudicate and what claims they do not want to hear. The claims that should be heard are those alleged by the Plaintiff. The EEOC and Court have a "Mandate" to adjudicate and eliminate claims of Race, Religion, Sex, and Discrimination etc. in the work place.

If this court and other courts and EEOC fail to do so we the American public have no rights within the law. I "PRAY" my rights and the rights of others would not be trampled on in such a manner.

If the Writ is not Granted and the question of Dual Employer is not decided all cases regarding Dual Employers in the Eleventh Circuit would be decided in error and Defendants allowed to prevail in well meritorious cases. This Court and other circuits have used the "who control the employee" as the overriding factor. (Mathieu v. Norrell Corp. et al., 2004 WL 309175 (Feb. 19, 2004), CAL App. 2 Dist.) (Gaines v. Department of the Army, EEOC APPEAL No. 01A53152 (July 6, 2006) (Piano v. Ameritech, N.D. Ill. No. 02-6-3337 (2/5/03)).

Defendants only answered the claim of wages which was refuted. They did not answer race, religion, disparity impact, discriminatory hours, failure to accommodate, and pretext. Courts nor Defendants answered these charges "A Prima Facie Case was made in all these Acts".

The law states that the court must look at case for Pretext. To not allow the Writ would permit Court to not adjudicate well meritorious cases. Plaintiff would be greatly prejudiced in all cases that would be filed after (Farrell v. Planters Lifesavers Co., 206 F.3d 2.1 (3rd Cir. 2000) (Roger Reeves, Petitioner v. Sanderson Plumbing Products, Inc., U.S. Supreme Court, No. 99-536 (June 12, 2000)).

The fact that they did not give a raise to Plaintiff because they did not give other Guards raises does not precludes a Prima Facie Case. All of the Guards should have been given a raise. I was the only one that raised the issues. The rate was low and a raise was not given in over four years and was given to

plant workers under the same manager for at least three times during this period. Plaintiff was discriminated against and all Guards because they were black, most of the time. There is an issue of why the "*Black*" Guards never received a raise and were not told the truth about the length of the Contract. District and Appellate Courts did not use standard method when deciding this case but only looked at one phase. They did not take total information into effect. DSI did mendacious lying about the contract and length of the Contract, Dislike of former Employee (Mr. Johnson) (a religious pentecostal), and lying about knowing I had any religion. All of these would preclude Summary Judgment for the Defendant. These more than hint that Defendant(s) could have had a discriminating motive for not giving Plaintiff a raise as well as discrimination in other areas related to pay, religion, and race. A Prima Facie Case has been made.

As stated to EEOC and in Summary Judgment, reports for Plaintiff Plant workers receive three on time raises but black Guard(s) did not receive any after being told a three year contract was in fact a one year contract. Defendants did not want to give a Guard but any Guard a raise. Disparity impact with a Prima Facie Case is proven which courts have failed to adjudicate. Because their unawareness of the Contract and the number of years they had two to my five they were not exactly similarly situated also.

The answer for Summary Judgment for Plaintiff and answer to Magistrate Judge Report against DSI and American states that DSI nor American gave

Guards (Blacks most of the time) a raise. This answered defendants that they never gave anyone a raise so they were not discriminatory. My original request for disparity impact negates that argument. All Guards should have received a raise per their statement (lying) that it was a three year contract.

CONCLUSION

In light of Appellate and District Court not following normal procedure and looking at all charges in the following (Haywood Williams, Jr. v. Federal Bureau of Prisons and Parole Commission Appellate for the Third District No. 00-1986) (Nov. 7, 2003)

(1) Religious Discrimination not allowing Plaintiff time off for religious observance and allowing white person time off and other black person; not allowing religious accommodation; lying about knowing Plaintiff having "any" religious Affiliation (Pretext Summary Judgment for Plaintiff)

(2) ALL ACTS OF FRAUD, DECEPTION, COVENANT OF GOOD FAITH District and Appellate Court failed to follow normal and correct procedure in evaluating fraud and Deception in the Contract that DSI said they had with American. DSI told Guards that it was a three year contract and court documents shows that they were not truthful and it was a one year contract. They were deceptive and fraudulent as per ALA Tort Statutes

and Alabama Fraud, Misrepresentation and Deceit Statutes (Article 8) (See Writ page 2)

(3) Dual Employee

Courts did not follow other Circuits and EEOC. Company American controls what to be done on premises and how it was to be done per their own Post Orders. (Gaines v. Department of the Army, EEOC Appeal No. 01A53152 July 6, 2006)

(4) Claims of Retaliation not adjudicated

(5) Race, Religion, Disparity impact never adjudicated

(6) Incorrectly evaluated Pay Discrimination

(7) Never examine in light of Pretext

(8) Hostile Work Environment. Plaintiff in EEOC and District Court documents stated a hostile work environment. (See Appellate Court Brief). Court was obligated to look at it since it was stated (implied) in EEOC Documents to intake person. (Confederate Flag worn, sewed on Plant worker shirts; refusal to answer CB when black person called until the third or fourth call or not at all. Management not liking Plaintiff's bible. Plaintiff ridiculed when plant worker named Roger died. (Green v. Elixer Industries, Inc., 407 F.3d 1163, 95 FEP 1151 (11th Cir. 2005)).

For the above reasons the Writ should be granted.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2

_____
Roger Reeves